

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OZONE INTERNATIONAL, LLC, a
Washington limited liability company,

Plaintiff,

vs.

WHEATSHEAF GROUP LIMITED, a foreign
private limited company registered in England
and Wales,

Defendant.

Case No. 2:19-cv-01108-RAJ

**ORDER DENYING PLAINTIFF’S
MOTION FOR A TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

I. INTRODUCTION

This matter comes before the Court on Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction (Dkt. #3). Defendant opposes the Motion (Dkt. #9). Having considered the submissions of the parties, the relevant portions of the record, and the applicable law, the Court finds that oral argument is unnecessary. For the reasons stated below, the Court **DENIES** the motion.

II. BACKGROUND

Plaintiff, Ozone International, LLC (“Ozone”) is a Washington-based company that “developed an ozone machine that significantly extends the shelf life of food and beverage

1 products.” Dkt. #3 at 2. In 2016, Ozone began discussions with Defendant, Wheatsheaf
2 Group Ltd. (“Wheatsheaf”), a private limited company based in the United Kingdom,
3 regarding Wheatsheaf’s potential acquisition of Ozone. Dkt. #3 at 5. For the purposes of
4 facilitating the deal, Ozone alleges that Wheatsheaf created two subsidiaries: Wheatsheaf
5 Group US Inc. (“WGUS”), a Delaware corporation with a principal place of business in
6 Minnesota, and Wheatsheaf Group US Food Safety LLC d/b/a TriStrata (“TriStrata”), a
7 Delaware limited liability corporation based in Washington. Dkt. #3 at 7; Dkt. #1 ¶ 7. On
8 August 17, 2017, Ozone entered into an Asset Purchase Agreement (“APA”) (Dkt. #1-1,
9 Ex. A) with TriStrata whereby TriStrata acquired a substantial number of Ozone’s assets,
10 excluding certain contracts (“the Excluded Contracts”) which Ozone retained ownership
11 over. Dkt. #3 at 6. Wheatsheaf (TriStrata’s parent company) was also a party to the APA
12 “solely for the purposes of Section 6.05 and any provisions of Article I, Article IX, and
13 Article XI as they relate to Section 6.05.” Dkt. #1-1, Ex. A. Section 6.05 provides: “Buyer
14 has sufficient cash on hand or other sources of immediately available funds to enable Buyer
15 to make payment of the Purchase Price and consummate the transactions contemplated by
16 this Agreement.” *Id.* In addition to the APA, TriStrata and Ozone also entered into a
17 Transition Services Agreement (“TSA”) (Dkt. #1-1, Ex. B), providing for the transition of
18 Ozone’s business to TriStrata over a period of time. Dkt. #9 at 6. Wheatsheaf is not a
19 party to the TSA. *Id.* at 10. Under section 4.02 of the TSA, TriStrata agreed to service the
20 Excluded Contracts and, in exchange, Ozone agreed to pay TriStrata a service fee. Dkt.
21 #1-1, Ex. B. The total purchase price (\$9.9 million) included a \$1.5 million reserve to
22 allow Ozone to “pay TriStrata for its continued servicing of the Excluded Contracts under
23 the TSA.” Dkt. #9 at 7.

24 Following the close of the deal, Wheatsheaf alleges that TriStrata routinely invoiced
25 Ozone for services provided under the TSA, however, after Ozone exhausted the \$1.5
26 million reserve, it stopped paying the invoiced amounts. Dkt. #9 at 8. As of February 28,
27 2019, TriStrata alleges that Ozone has failed to pay up to \$1,860,166.99 in invoices. Dkt.

1 # 9 at 8. On March 29, 2019 TriStrata brought suit against Ozone in King County Superior
2 Court alleging breach of contract and requesting a declaratory judgment excusing TriStrata
3 from further performance under the TSA due to Ozone’s “material breach.” Dkt. #10-1.
4 Two months later, on May 31, 2019, TriStrata filed a petition for receivership in King
5 County Superior Court. Dkt. # 10-2. Since filing for receivership, Ozone alleges that
6 TriStrata has fallen behind on servicing the Excluded Contracts under the TSA. Dkt. #3 at
7 11. According to Ozone, it has received multiple complaints from customers regarding
8 TriStrata’s failure to service their ozone machines. *Id.* at 11-12. If left unchecked, Ozone
9 contends that TriStrata’s failure to service the ozone machines will have a “catastrophic
10 effect on Ozone and the users of the North American food supply.” *Id.* at 12.

11 On July 17, 2019, Ozone filed a complaint (Dkt. #1) alleging breach of contract,
12 fraud, negligent representation, and alter ego claims along with a motion for a temporary
13 restraining order (“TRO”) and preliminary injunction (Dkt. # 3). Wheatsheaf opposes
14 Ozone’s motion (Dkt. #9).

15 **III. LEGAL STANDARD**

16 A preliminary injunction is an “extraordinary remedy that may only be awarded
17 upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def.*
18 *Council, Inc.*, 555 U.S. 7, 22 (2008). The standards for a preliminary injunction and
19 temporary restraining order are “substantially identical.” *Stuhlbarg Int’l Sales Co. V.*
20 *John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). To obtain injunctive relief,
21 Ozone must show that (1) it is likely to succeed on the merits, (2) it is likely to suffer
22 irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its
23 favor, and (4) an injunction is in the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d
24 1109, 1127 (9th Cir. 2009). “A preliminary injunction is appropriate when a plaintiff
25 demonstrates that serious questions going to the merits were raised and the balance of
26 hardships tips sharply in the plaintiff's favor.” *All For The Wild Rockies v. Cottrell*, 632
27 F.3d 1127, 1134–35 (9th Cir. 2011). This is only appropriate as long as the plaintiff also

1 shows there is a likelihood of irreparable injury and that the injunction is in the public
2 interest. *Id.*

3 **IV. DISCUSSION**

4 Ozone asks the Court to issue a TRO or preliminary injunction forcing Wheatsheaf
5 to either disregard its corporate form and collapse Wheatsheaf, WGUS, and TriStrata into
6 one entity, or require Wheatsheaf to “make WGWA [TriStrata] solvent through equity
7 without giving itself a preference over any of WGWA creditors.” Dkt. #3 at 3-4.

8 In order to obtain injunctive relief, Ozone must first establish a likelihood of success
9 on the merits. Here, Ozone contends that it insisted that Wheatsheaf be a party to section
10 6.05, in order to ensure that TriStrata had the financial backing to meet its obligations under
11 the APA and the TSA. Dkt. #3 at 8. By failing to provide TriStrata with the necessary
12 funds to enable it to continue servicing the Excluded Contracts under the TSA and allowing
13 it to go into receivership, Ozone argues that Wheatsheaf has breached its obligations under
14 the APA. *Id.* at 15.

15 Wheatsheaf, on the other hand, insists that it was only a party to the APA for the
16 limited purpose of ensuring TriStrata had sufficient funds to consummate the closing and
17 pay the Purchase Price and that its obligation did not extend to the TSA (to which it is not
18 a party). Dkt. #9 at 11. Wheatsheaf notes that Section 6.05 is a representation and
19 warranty, not a guarantee, and that it has already satisfied its obligation under the APA,
20 when TriStrata paid the Purchase Price in full. *Id.* at 11-12. In addition, Wheatsheaf
21 argues, even if TriStrata did have an obligation to service the Excluded Contracts, it is no
22 longer required to continue servicing the Excluded Contracts in light of Ozone’s material
23 breach of the TSA. *Id.* at 12.

24 Under Washington law, if a party is in material breach of a contract, the other party
25 may treat the breach as a condition excusing further performance. *Colorado Structures,*
26 *Inc. v. Ins. Co. of the W.*, 161 Wash. 2d 577, 589 (2007). A material breach is one that
27 “substantially defeats” a primary function of the agreement. *Park Ave. Condo. Owners*

1 *Ass'n v. Buchan Devs., LLC*, 117 Wash.App. 369, 383 (2003). Materiality is “dependent
2 upon the circumstances of each particular case.” *Jacks v. Blazer*, 39 Wash. 2d 277, 286
3 (1951). Here, TriStrata agreed to service the Excluded Contracts and, in exchange, Ozone
4 agreed to pay a service fee within fifteen days of receipt of an invoice from TriStrata. Dkt.
5 1-1, Ex. B, TSA § 4.02. According to Wheatsheaf, Ozone has failed to pay up to
6 \$1,860,166.99 in invoices as of February 28, 2019. Dkt. # 9 at 8. Without these funds,
7 TriStrata alleges that it is unable to cover its monthly costs, forcing it to file for
8 receivership. *Id.* at 9. On the record before the Court, it seems likely that a jury would
9 find Ozone’s breach “material.” *Jacks*, 39 Wash. 2d at 286 (holding a breach was material
10 where the buyer failed to make advance payment on demand for lumber and the seller
11 relied upon the disputed funds “to keep the mill in operation.”). The Court finds that
12 Ozone has failed to establish a likelihood of success on the merits of its claims because it
13 is likely that Ozone materially breached its agreement with TriStrata.

14 Furthermore, even if Ozone could demonstrate a likelihood of success on the merits,
15 it has failed to demonstrate that it will suffer irreparable harm. In order obtain an
16 injunction, Ozone must show that it is likely to suffer irreparable harm – the mere
17 possibility of irreparable harm is insufficient. *Winter v. Nat. Res. Def. Council, Inc.*, 555
18 U.S. 7, 22 (2008). In support of its request for injunctive relief, Ozone argues that if
19 TriStrata fails, Ozone will potentially be in breach of approximately 250 of the Excluded
20 Contracts and face “nearly limitless liability.” Dkt. #3 at 23. But monetary damages alone
21 do not establish irreparable harm. *See, e.g., Hughes v. United States*, 953 F.2d 531, 535-
22 36 (9th Cir. 1992) (financial suffering and alleged due process violations insufficient to
23 demonstrate irreparable injury); *Elias v. Connett*, 908 F.2d 521, 526 (9th Cir. 1990)
24 (monetary harm alone insufficient to merit injunctive relief). In addition, courts are
25 generally reluctant to grant the type of relief Ozone seeks on a motion for a temporary
26 restraining order or preliminary injunction. *Great-W. Life & Annuity Ins. Co. v. Knudson*,
27 534 U.S. 204, 210–11 (2002) (“[A]n injunction to compel the payment of money past due

1 under a contract, or specific performance of a past due monetary obligation, was not
2 typically available in equity.”); *Lombardo v. Prop. & Cas. Ins. Co. of Hartford*, 2017 WL
3 3710072, at *2 (D. Nev. Aug. 28, 2017) (“Courts sitting in equity generally do not issue
4 preliminary injunctions to compel payments under a contract during the pendency of a
5 case.”).

6 Ozone also adds that the failure to grant injunctive relief will have a “catastrophic”
7 effect on the North American food supply, noting that Ozone has the “only national field
8 service team for ozone machines.” Dkt. #3 at 12; Dkt. #4 ¶ 16, Brandt Decl.. However,
9 Ozone provides little support for these allegations. For example, is Ozone the only entity
10 capable of providing these food preservation systems such that without Ozone, the United
11 States’ food supply would be in jeopardy? Ozone also fails to provide evidence regarding
12 the likelihood or immediacy of the alleged harm. Ozone has known of TriStrata’s
13 receivership since May 2019 and received customer complaints as early as June 10, 2019.
14 Dkt. #3 at 11-12. When is the “catastrophic” harm to the United States’ food supply
15 expected to take effect? Conclusory or speculative allegations are not enough to establish
16 a likelihood of irreparable harm. *Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*,
17 736 F.3d 1239, 1250 (9th Cir. 2013); *see also Caribbean Marine Servs. Co. v. Baldrige*,
18 844 F.2d 668, 674 (9th Cir. 1988) (“Speculative injury does not constitute irreparable
19 injury sufficient to warrant granting a preliminary injunction.”); *Am. Passage Media Corp.*
20 *v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (finding irreparable harm not
21 established by statements that “are conclusory and without sufficient support in facts”).
22 Ozone’s speculative allegations, without more, are insufficient to state irreparable harm.

23 Finally, the balance of equities weighs against granting injunctive relief. As noted
24 above, Plaintiff knew that TriStrata entered receivership on May 31, 2019 and began
25 receiving complaints from customers regarding TriStrata’s failure to service their ozone
26 machines as early as June 10, 2019. Dkt. #3 at 11-12. There is nothing before the Court
27 to suggest that Plaintiff could not have sought relief by a motion for a preliminary
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1 injunction at an earlier date rather than seeking relief now by way of a temporary
2 restraining order. *See Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir.
3 1984) (“A delay in seeking a preliminary injunction is a factor to be considered in weighing
4 the propriety of relief.”); *Dahl v. Swift Distrib., Inc.*, 2010 WL 1458957, at *4 (C.D. Cal.
5 2010) (finding that eighteen-day delay in filing TRO application “implie[d] a lack of
6 urgency and irreparable harm”). Indeed, Wheatsheaf alleges that Ozone filed this Motion
7 immediately following an unsuccessful mediation session between the parties. Dkt. #9 at
8 16. The Court will not tolerate TRO engagement for the sole purpose of obtaining a tactical
9 advantage. Having reviewed the motion, complaint, submissions of parties, and applicable
10 law, the Court concludes that Ozone has not carried its burden to warrant injunctive relief.

11 V. CONCLUSION

12 For the reasons stated above, the Court **DENIES** Plaintiff’s motion. Dkt. # 3.

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14 DATED this 22nd day of July, 2019.

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18 The Honorable Richard A. Jones
19 United States District Judge
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